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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

THE PEOPLE, Plaintiff and Respondent, v. VERNON SHAW, III, Defendant and Appellant.	C043228 (Super. Ct. No. SF082211A)

APPEAL from a judgment of the Superior Court of San Joaquin County, Bernard J. Garber, Judge. Affirmed as modified.

Deanna F. Lamb, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Mary Jo Graves, Assistant Attorney General, Matthew L. Cate, Julie A. Hokans and John A. Thawley, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Vernon Shaw III appeals from the judgment of conviction of two counts of attempted murder (Pen. Code,

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* The Reporter of Decisions is directed to publish the opinion except for the Facts and Parts I-III and V-VI of the Discussion.

§§ 664/187, subd. (a); counts 1, 2),[1] three counts of assault with a semiautomatic firearm (§ 245, subd. (b); counts 4, 5, 7), three counts of discharging a firearm from a vehicle (§ 12034, subd. (c); counts 9, 10, 11), and related firearm enhancements (§§ 12022.53, subd. (d), 12022.55, 12022.5, subd. (a)(1)).[2] The offenses arose out of a drive-by shooting of seven individuals for which defendant, who was the actual shooter, received a prison sentence of 98 years to life.

On appeal he contends the trial court erred by failing to give a special accomplice instruction, giving CALJIC No. 2.03 relating to false statements, allowing the use of a demonstration firearm for illustrative purposes, not requiring jury findings on the objectives of the offenses, staying rather than striking a firearm use enhancement, and failing to award presentence conduct credits.

With the exception of defendant's last claim, we find no error. As to his last claim, we find the trial court erred when it failed to grant presentence conduct credits without providing him with notice and an opportunity to be heard. We shall therefore order that the abstract of judgment be modified to reflect an award of 292 days of credits under section 4019.

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[1] All further section references are to the Penal Code unless otherwise specified.

[2] Defendant was tried initially by a jury that was unable to reach any verdicts as to him and a mistrial was declared.

In the published portion of the opinion we consider defendant's claim the recent case of *Blakely v. Washington* (2004) 542 U.S. ___ [159 L.Ed.2d 403, 412] (*Blakely)* precludes the imposition of consecutive unstayed sentences because the trial court determined that the offenses involved different objectives and different victims. We disagree.

The information charged separate assaults for each victim and each verdict returned by the jury found that defendant committed an assault against a different named individual. Because the imposition of consecutive sentences was based upon the jury's verdicts rather than the court's independent findings of fact, defendant's sentence does not run afoul of *Blakely.*

In all other respects we shall affirm the judgment and sentence.

FACTS

A. Prosecution's Case

Robert Horn worked and lived about a block from Poplar Street, in Stockton. He had recently acquired a burgundy-colored Cutlass and on April 28, 2001, someone broke his car window and stole his stereo.

On May 2, 2001, Sean Abrams, an acquaintance of Horn's, appeared and told Horn he had seen a guy named "Fooka" break into Horn's car and steal the stereo. He also told Horn he knew where Fooka lived. The two men drove three houses down and parked on the corner of Poplar Street, where they saw Zakarias Brown and another male. Abrams identified Zakarias, aka

"Fooka," as the thief. Horn had seen Zakarias in the neighborhood, so he got out of his car and approached him, telling Zakarias that he (Horn) had heard that Zakarias had stolen his car stereo. Zakarias denied stealing the stereo and the two discussed the matter. Horn believed him and concluded that Abrams had lied to him, so he told Zakarias to forget the matter, they shook hands, and Horn turned and began walking back to his car.

As Horn walked away, Zakarias said, "If you want trouble, I give him trouble." Horn then saw Abrams charge towards Zakarias, while pushing up his sleeves. Zakarias pulled out a handgun and shot Abrams in the neck, and as Abrams turned to run, Zakarias shot him again in the back. Horn thought Zakarias was shooting at Abrams.

Abrams screamed he was hit, jumped into Horn's car, and Horn drove him to Dameron Hospital. During that drive, Abrams asked Horn to go back and retrieve his cell phone, which he had dropped when he was shot. Horn told him not to worry.

Horn spoke to police officers at the hospital and agreed to go back to the scene to try and identify the shooter. He was transported in a patrol car to the scene of the shooting where he identified Zakarias and Zakarias was arrested. About 30 minutes later, the police returned Horn to the hospital. Meanwhile, Abrams's family had arrived at the hospital, including defendant, Abrams's brother. Abrams's mother asked Horn if he knew where Abrams dropped his cell phone and he told

her he did. Shortly afterwards, defendant asked Horn if he would take him to the area where Abrams had dropped his cell phone and Horn agreed.

Meanwhile, people had begun gathering in front of the apartment complex where Abrams was shot. Two of Zakarias's brothers, Darwin Brown and Clayton Brown, were standing in the driveway in front of the apartment complex, talking about Zakarias's arrest. Their longtime friend David Brown III and his one-year-old son, David Brown Jr., came by and saw Zakarias seated in the back of a police car and Horn seated in another police car talking on a cell phone. Darwin told David that Horn was responsible for Zakarias's arrest. A short time later, Calvin Davis, Maurice Crawford, and Carnell Burse stopped to talk to the Brown brothers.

Meanwhile, Horn and defendant were headed back to Poplar Street in Horn's Cutlass, ostensibly to retrieve Abrams's cell phone. During the drive, defendant asked Horn about Zakarias and Horn told him the police had taken him to jail. When they reached Poplar Street, Darwin spotted the Cutlass as it slowly approached them and said "[h]ere come those fools now." He and Clayton thought there was going to be trouble as a result of the Abrams's shooting. The rest of the men in their group stood up to see the car and as it approached the group, Darwin started walking towards it. Just as he reached the sidewalk, the car stopped and defendant began shooting a semiautomatic handgun from the passenger window.

Darwin and Clayton were hit and fell to the ground. Calvin was also hit in the face but was able to run up the stairs for help. Upon hearing the first shot, David grabbed his son and hit the ground, while Maurice jumped over a gated fence, and Carnell followed by breaking through it.

Darwin Brown was hit twice in the head and once in the leg and lay on the ground unconscious. He regained consciousness in the hospital where he remained for a month. Bullet fragments remain lodged in his head. Clayton Brown was shot four times, twice in the buttocks, once in the leg, and once in the thigh. One of the bullets exited through his penis. Calvin Davis was shot in the face and lost his eye.

Immediately after the shooting, defendant pointed the gun at Horn and ordered him to drive away. Horn complied, but as he was driving, he heard a clicking sound. Thinking defendant was reloading his gun, he looked at defendant, which caused him to hit another car. Defendant exited the car and fled on foot. Horn drove to the Greyhound bus station, caught a bus to Mississippi, and stayed there for one day. He then went to Milwaukee, where he stayed for about a month until he was arrested.

An anonymous tip led Stockton Police officials to Buffalo, New York where defendant was apprehended after he attempted to flee from 12 to 15 Buffalo police officers who pursued him in a foot chase through numerous fenced in yards. He was subsequently extradited to California.

B. Defense

Defendant took the stand and testified in his own behalf. He denied being in Horn's car on May 2, 2001, or shooting the victims, and pointed the finger at Horn. He testified that after he learned his brother had been shot, he went to the hospital where he found out what happened. He spoke to Horn at the hospital about the shooting and Horn told him he had just come from the scene of the shooting where he identified the shooter, although he did not identify the shooter by name. Defendant left the hospital by himself and went home where he told his girlfriend what happened, then he went to his uncle's house and then to his aunt's house. The following day, Sean told him about the shooting of the Brown brothers and their friends. Later, he heard that people in the neighborhood were looking for him and felt he and his family were in danger, so he decided to take his family and leave Stockton. He went to Los Angeles first and then to Buffalo, New York where his cousin lived.

Defendant also called several witnesses who testified. According to his aunt, Ocee Deed, she met Horn a couple of days before the shooting when he was driving his Cutlass. At that time, he said the only thing wrong with his car was that "Darfus and them," who lived around the corner from him, had stolen his stereo and that he was going to get them niggers for that. When she told him he could always get a new stereo, he said, "'No. No. I'm going to get them niggers.'"

Sean Abrams testified that on May 2, 2001, Horn called him on his cell phone and told him he had seen the people who stole his stereo and he wanted to go jump them. He picked up Abrams and they drove around the corner where Horn approached Fooka and an argument ensued. Sean was standing by Horn's car when Horn started to run towards him, and Fooka started shooting. Abrams was sure Fooka was shooting at Horn, although Abrams was the one that got hit, once in the neck and then as he ran away, again in the back. On the drive to the hospital, Horn told Abrams he was going back to take care of business. Abrams did not see his brother at the hospital.

DISCUSSION

I.

Special Accomplice Instruction

Defendant contends the trial court erred by refusing to give a special accomplice instruction, one proposed in a concurring opinion by Justice Kennard in *People v. Guiuan* (1998) 18 Cal.4th 558 (*Guiuan*). Respondent contends there was no error because the trial court properly gave the instruction approved by the majority in *Guiuan* and also gave the full array of accomplice instructions. We agree with respondent and find no error.

The instruction requested by defendant was proposed by Justice Kennard in her concurring opinion in *Guiuan.* It advises the jury on the reasons why accomplice testimony should be viewed with greater care and caution and directs the jury to

"view with distrust accomplice testimony that supports the prosecution's case." (18 Cal.4th at p. 576.)[3] Because concurring opinions are not binding (*Rosato v. Superior Court* (1975) 51 Cal.App.3d 190, 211; *People v. Amadio* (1971) 22 Cal.App.3d 7, 14), the trial court properly refused to give this instruction.

Instead, the trial court gave the instruction (CALJIC No. 318) proposed by the majority in *Guiuan.*[4] Moreover, the jury was

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[3] The proposed instruction states: "In deciding whether to believe testimony given by an accomplice, you should use greater care and caution than you do when deciding whether to believe testimony given by an ordinary witness. Because an accomplice is also subject to prosecution for the same offense, an accomplice's testimony may be strongly influenced by the hope or expectation that the prosecution will reward testimony that supports the prosecution's case by granting the accomplice immunity or leniency. For this reason, you should view with distrust accomplice testimony that supports the prosecution's case. Whether or not the accomplice testimony supports the prosecution's case, you should bear in mind the accomplice's interest in minimizing the seriousness of the crime and the significance of the accomplice's own role in its commission, the fact that the accomplice's participation in the crime may show the accomplice to be an untrustworthy person, and an accomplice's particular ability, because of inside knowledge about the details of the crime, to construct plausible falsehoods about it. In giving you this warning about accomplice testimony, I do not mean to suggest that you must or should disbelieve the accomplice testimony that you heard at this trial. Rather, you should give the accomplice testimony whatever weight you decide it deserves after considering all the evidence in the case." (18 Cal.4th at p. 576.)

[4] The court in *Guiuan* directed that "the jury should be instructed to the following effect whenever an accomplice, or a witness who might be determined by the jury to be an accomplice, testifies: 'To the extent an accomplice gives testimony that tends to incriminate the defendant, it should be viewed with

also instructed that Horn was an accomplice as a matter of law and properly given the corresponding full array of pattern instructions for evaluating accomplice testimony, including the definition of an accomplice (CALJIC No. 3.10), the requirement that accomplice testimony be corroborated (CALJIC No. 3.11), the nature and sufficiency of corroborative evidence (CALJIC No. 3.12), the necessity of criminal intent (CALJIC No. 3.14), and the requirement that accomplice testimony be viewed with caution. (CALJIC No. 3.18). (*People v. Noguera* (1992) 4 Cal.4th 599, 630-631.) We therefore conclude the jury was properly instructed on accomplice testimony and that the trial court did not err in refusing to give the requested special instruction.

II.

CALJIC No. 2.03

Defendant contends it was error to give CALJIC No. 2.03 because this instruction applies only to pretrial out-of-court statements concerning the offense, not to former testimony concerning flight from police. Respondent contends the instruction was properly given and that any error was harmless. We agree with respondent that giving the instruction was harmless error.

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caution. This does not mean, however, that you may arbitrarily disregard that testimony. You should give that testimony the weight you think it deserves after examining it with care and caution and in the light of all the evidence in the case.'" (18 Cal.4th at p. 569.)

The prosecution's evidence established that officers from the Buffalo Police Department went to a house in Buffalo, looking for defendant. They located his luggage and children at the house, and found defendant standing on the street about a mile away from the house. When Officer Swaggard approached defendant, he jumped a six-foot fence and ran from him, ultimately leading 12 to 15 police officers on a foot-chase through several fenced in yards. Midway through the chase, uniformed police officer Jackson spotted defendant, identified himself as a police officer, and told defendant to stop. Defendant did not comply but jumped another fence and continued to run until Officer Jackson tackled him.

On cross-examination, defendant testified that at the last trial his testimony was that he ran from the police. However, he admitted he previously testified that he merely ran around the corner, laid down, and put his hands behind his back. He also admitted that in his prior testimony, he denied jumping six to ten fences.

CALJIC No. 2.03 instructs the jury that if it finds the defendant made a willfully false or misleading statement concerning the charges, it may consider the statement as a circumstance tending to prove a consciousness of guilt.[5]

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[5] CALJIC NO. 2.03 as given to the jury states: "If you find that before this trial the defendant made a willfully false or deliberately misleading statement concerning the crimes for which he is now being tried, you may consider that statement as a circumstance tending to prove a consciousness of guilt.

"The giving of CALJIC No. 2.03 is justified when there exists evidence that the defendant prefabricated a story to explain his conduct. The falsity of a defendant's pretrial statement may be shown by other evidence even when the pretrial statement is not inconsistent with defendant's testimony at trial." (*People v. Edwards* (1992) 8 Cal.App.4th 1092, 1103.) The instruction has been given where there is evidence the defendant made exculpatory pretrial statements to police or other witnesses concerning his involvement in the offense. (*People v. Edwards, supra,* 8 Cal.App.4th at p. 1103; *People v. Boyette* (2002) 29 Cal.4th 381 438; *People v. Jackson* (1996) 13 Cal.4th 1164, 1224-1225; *People v. Kane* (1984) 150 Cal.App.3d 523, 533; *People v. Ryan* (1981) 116 Cal.App.3d 168, 179.)

Defendant relies on *People v. Rankin* (1992) 9 Cal.App.4th 430 where the court stated that "CALJIC No. 2.03 should never be given unless it can be inferred that the defendant made the false statement for the purpose of deflecting suspicion from himself, as opposed to protecting someone else." (*Id.* at p. 436; see also *People v. Louis* (1984) 159 Cal.App.3d 156, 160 ["[T]he giving of CALJIC No. 2.03 is justified when there is evidence that a defendant fabricated a story to explain his conduct."])

However, that conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are for you to decide."

We need not reach the merits of defendant's claim because we find that even if giving the instruction was error, it was harmless. (*People v. Watson* (1956) 46 Cal.2d 818, 835.)

CALJIC No. 2.03 is permissive. It allows the jury to determine in the first instance whether defendant's statement was false or misleading, while also clarifying that the statement is not of itself sufficient to prove a defendant's guilt, "allowing the jury to determine the weight and significance assigned to such behavior. The cautionary nature of the instructions benefits the defense, admonishing the jury to circumspection regarding evidence that might otherwise be considered decisively inculpatory." (*People v. Jackson, supra,* 13 Cal.4th at p. 1224; *People v. Medina* (1995) 11 Cal.4th 694, 762; *People v. Kelly* (1992) 1 Cal.4th 495, 531-532.) The false statement concerned a matter collateral to the question of guilt, and as to that question, the evidence was very strong. Defendant was identified as the shooter by Horn, and by the testimony of Darwin and Clayton Brown and David Brown III, who had met defendant three years earlier when he had a conversation with him about their mutual interest in music. Both Clayton and David positively identified defendant prior to trial, and all three men positively identified defendant at trial. Additionally, Jacqueline Applon, the manager of the building where Horn lived and who was at Dameron Hospital after Sean Abrams was brought in, saw defendant and Horn leave the hospital

together. Shortly after the shootings, defendant fled Stockton and was apprehended in Buffalo, New York.

Moreover, defendant's prior testimony was shown to be false and inconsistent with his trial testimony, and the jury was given other instructions which informed it that a prior inconsistent statement could be considered for purposes of determining a witness's credibility (CALJIC Nos. 2.20, 2.13) and that an inference of guilt may be drawn from evidence of flight. As defendant recognizes, this was proper because the undisputed evidence established that he ran from the Buffalo police. (*People v. Hill* (1967) 67 Cal.2d 105, 120; *People v. Cannady* (1972) 8 Cal.3d 379, 391.)

In sum, given the conditional language of CALJIC No. 2.03, the strength of the prosecution's evidence, including the testimony of four eyewitnesses who identified defendant as the shooter, the falsity of defendant's statement relating to his flight from the Buffalo police, and the instructions relating to prior inconsistent statements and flight, it is not reasonably probable that a different verdict would have resulted had CALJIC No. 2.03 not been given.

III.

Admission of Illustrative Firearm

Defendant contends reversal is required because the prosecution introduced a firearm which was not involved in the shooting and unfairly influenced the verdicts on the three assault charges. Respondent contends the trial court properly

allowed the prosecutor to use, for illustrative purposes only, a semiautomatic firearm similar to the one used by defendant to commit the charged offenses. We find no error.

Defendant was charged with four counts of assault with a semiautomatic firearm (§ 245, subd. (b)), placing in issue the type of firearm.[6] The firearm used to commit the crimes was never located, although Officer Thrush found six 9-millimeter spent shell casings in the street at the crime scene immediately following the shootings. The prosecution used a demonstration semiautomatic 9-millimeter firearm, referred to as a Sig Sauer, model 226 for identification and illustrative purposes. Horn identified the demonstration model as the kind of gun used by defendant.[7] Officer Thrush used the model firearm to explain how a semiautomatic handgun is loaded and fired and to discuss the differences between a semiautomatic pistol and a revolver.[8] At

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[6] In his closing argument, the prosecutor told the jury that on counts 4 though 7, "if you believe that Vernon Shaw was the shooter and you have some reasonable doubt that it was a semi-automatic that was used, but you believe it was some other type of firearm, you can find him not guilty of these charges and find him guilty of the lesser included offense of assault with a firearm." (§ 245, subd. (a)(2).)

[7] Darwin Brown, Clayton Brown, Calvin Davis and Carnell Burse all testified the gun used by defendant was a semiautomatic pistol or looked like one.

[8] Thrush testified that the spent shell casings are automatically ejected from a semiautomatic pistol and will fly several feet and may bounce depending on the surface that they land on. A revolver on the other hand, requires that a button

the end of the prosecution's case-in-chief, the prosecutor withdrew the firearm from evidence.

"Where the actual weapon is not found, it is quite proper to introduce a replica or similar weapon to the jury as an example of the type of weaponry that might have been used in a crime." (*People v. Frausto* (1982) 135 Cal.App.3d 129, 143; *People v. Barnett* (1998) 17 Cal.4th 1044, 1135 ["[i]t is entirely proper for a prosecutor to use objects similar to those connected with the commission of a crime for purposes of illustration"].) Such evidence is proper as long as it is useful for illustrative purposes, has no tendency to evoke an emotional bias against the defendant, and is not used to mislead the jury into believing the weapon is the actual murder weapon. (*People v. Barnett, supra*, at p. 1136.)

Applying these principles, we find no error. The gun used by defendant was never found, the demonstration model was of the same caliber as the one used by defendant and Horn testified the model firearm was similar to the one used by defendant. Officer Thrush used it for illustrative purposes to explain how the weapon functioned and why spent shell casings would be ejected onto the street. The prosecution therefore established an adequate foundation for its use. Moreover, because the handgun was clearly identified as a demonstration firearm, which had no connection to defendant personally, the jury was not mislead

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be pushed to eject the spent casings, which then all fall at once.

into believing it was the weapon actually used by defendant or to evoke an improper inference or bias against defendant by suggesting he possessed other such weapons. Accordingly, we find no error in permitting the prosecution to use the weapon for illustrative purposes as was done here.

IV.

Penal Code section 654 and *Blakely*

Defendant contends imposition of consecutive unstayed sentences violated the rule announced in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [147 L.Ed.2d 435] (*Apprendi*) and the recently decided *Blakely v. Washington, supra*. Citing the concurring opinion in *People v. Cleveland* (2001) 87 Cal.App.4th 263, 272-282, he argues that under *Apprendi,* the factual determination required by section 654 that the offenses involved multiple objectives, must be made by the jury, not the trial court. In a supplemental brief, he contends the decision to impose consecutive sentences violated *Blakely* because that decision rests on findings of fact beyond those necessarily found by the jury's verdict.

Relying on the majority opinion in *People v. Cleveland,* 87 Cal.App.4th 263, respondent contends the section 654 claim has no merit because *Apprendi* only applies to penalty enhancing statutes and section 654 is a penalty reducing statute. Respondent also contends, citing *People v. Sykes* (2004) 120

Cal.App.4th 1331, that *Blakely* does not apply to the imposition of consecutive sentences.[9]

Imposition of consecutive terms of imprisonment results in a longer total sentence than concurrently imposed terms of imprisonment and the decision to impose consecutive terms may under some circumstances require findings of fact not found by the jury. Nevertheless, we need not address the broad issues tendered by the parties because those circumstances are not here present. We hold that imposition of consecutive sentences does not violate the proscription of *Apprendi* and *Blakely* where the basis for that sentencing choice is supported by the express findings in the jury's verdicts.

In *Apprendi, supra,* 530 U.S. 466 [147 L.Ed.2d 435], the defendant fired a gun into the home of an African-American family and was charged with possession of a firearm for an unlawful purpose, which carried a five to ten year sentence. After he pled guilty, the prosecutor moved to enhance the sentence under the New Jersey hate crime statute, which provided for an extended term of imprisonment for 10 to 20 years if the trial court finds by a preponderance of the evidence the defendant "'acted with a purpose to intimidate an individual or

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[9] Respondent contends defendant waived his *Apprendi/Blakely* claim as it relates to consecutive sentences by failing to raise it in the trial court. Because this issue raises a question of constitutional law that we may resolve from the record before us, we shall exercise our discretion and consider the merits of the claim. (*People v. Marchand* (2002) 98 Cal.App.4th 1056, 1061.)

group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity.'" (*Id.* at pp. 468-469 [147 L.Ed.2d at p. 442].) After an evidentiary hearing, the court found the shooting was racially motivated and sentenced the defendant to 12 years imprisonment. (*Id.* at pp. 469-471 [147 L.Ed.2d at pp. 442-443].)

The United States Supreme Court reversed the sentence, holding that the procedure used to enhance the sentence violated the Due Process Clause of the Fourteenth Amendment. The rule articulated by the court requires that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed *statutory maximum* must be submitted to a jury, and proved beyond a reasonable doubt." (*Id.* at p. 490 [147 L.Ed.2d at p. 455]; italics added.)

Most recently, the Supreme Court applied the rule of *Apprendi* to invalidate a state court sentence where the defendant pled guilty to kidnapping his estranged wife. (*Blakely, supra,* 542 U.S. at p. ____ [159 L.Ed.2d at p. 412].) Although the facts admitted in the plea supported a maximum sentence of 53 months, the trial court imposed a 90-month sentence after finding the defendant had acted with "deliberate cruelty," a statutory ground for imposing a longer sentence. The high court explained that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." (*Id.* at p. ___ [at p. 413].)

The majority concluded that because the sentence was three years beyond what state law authorized for the crime to which the defendant pled guilty, it violated the defendant's right to a jury trial on the disputed facts.

With these principles in mind, we examine California's sentencing scheme for imposing consecutive sentences. Section 669 grants the trial court broad discretion to impose consecutive sentences when a person is convicted of two or more crimes. (§ 1170.1, subd. (a); *In re Hoddinott* (1996) 12 Cal.4th 992, 1000; *People v. Scott* (1994) 9 Cal.4th 331, 349; *People v. Neal* (1993) 19 Cal.App.4th 1114, 1117.) The sentencing rules specify several criteria to guide the trial court's determination whether to impose consecutive or concurrent terms. Pertinent to this case is the fact the "crimes involved separate acts of violence . . . ." (Cal. Rules of Court, rule 4.425(a)(2) (hereafter rule).)[10] Under this criterion, the court

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[10] Rule 4.425 provides in full as follows: "Criteria affecting the decision to impose consecutive rather than concurrent sentences include:

(a) Facts relating to the crimes, including whether or not:

(1) The crimes and their objectives were predominantly independent of each other.

(2) The crimes involved separate acts of violence or threats of violence.

(3) The crimes were committed at different times or separate places, rather than being committed so closely in time and place as to indicate a single period of aberrant behavior.

may impose consecutive sentences for separate acts of violence against multiple victims. (*People v. Champion* (1995) 9 Cal.4th 879, 934; *People v. Thurs* (1986) 176 Cal.App.3d 448, 452-453.)

Operating in tandem under similar criteria but in reverse fashion from rule 4.425, section 654, subdivision (a) prohibits multiple punishment for a single act or indivisible course of conduct that is punishable under more than one criminal statute.[11] "Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one." (*Neal v. State of California* (1960) 55 Cal.2d 11, 19; *People v. Perez (1979) 23 Cal.3d 545, 551*.) However, this prohibition against multiple punishment is inapplicable "'where . . . one act has two results each of which is an act of violence against the person of a separate

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(b) Any circumstances in aggravation or mitigation may be considered in deciding whether to impose consecutive rather than concurrent sentences, except (i) a fact used to impose the upper term, (ii) a fact used to otherwise enhance the defendant's prison sentence, and (iii) a fact that is an element of the crime shall not be used to impose consecutive sentences."

[11] Section 654, subdivision (a) provides in pertinent part: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision."

individual.'" (*Neal v. State of California, supra*, 55 Cal.2d at pp. 20-21, quoting *People v. Brannon* (1924) 70 Cal.App. 225, 235-236; *People v. Deloza* (1998) 18 Cal.4th 585, 592.)

Thus, the court may impose consecutive terms of imprisonment where the criminal act is an act of violence against separate individuals and rule 4.425 and section 654 does not prohibit multiple punishment under that circumstance. That is the operative circumstance in this case. The court imposed consecutive sentences on counts one (Darwin Brown), two (Clayton Brown), four (David Brown III), five (David Brown, Jr.), seven (Carnell Burse), and ten (Calvin Davis) because they involved acts of violence against separate victims, and stayed the sentences on counts eight and nine because those two counts involved the same victims (Darwin and Clayton) and the same operative facts as did counts one and two.

Nor was the court's decision to impose consecutive terms of imprisonment barred by *Apprendi* or *Blakely* because the fact supporting its decision was found by the jury. The information charged separate assaults for each victim and each verdict returned by the jury found that defendant committed an assault against a different named individual. Therefore, because imposition of consecutive sentences on counts one, two, four, seven, and ten was based upon the jury's verdicts rather than the court's independent findings of fact, defendant's sentence does not run afoul of *Apprendi* and *Blakely*. We therefore reject his claim of error.

V.
Staying Imposition of Punishment On
Personal Firearm Use Enhancement

Defendant contends the trial court erred by staying rather than striking the section 12022.55 enhancements. He argues that enhancements must either be imposed or stricken and that because section 12022.53, subdivision (f) prohibits imposition of the enhancement, it must be stricken, not stayed. Respondent contends defendant waived this claim and citing *People v. Bracamonte* (2003) 106 Cal.App.4th 704, 713, claims it has no merit.

We find the trial court properly imposed sentence on the enhancement and stayed its execution pending completion of the sentence imposed under section 12022.53. We find *People v. Bracamonte* inapposite.

Defendant did not raise this claim in the trial court and under the general rule, only those claims properly raised by a timely objection in the trial court will be reviewed on appeal. (*People v. Scott* (1994) 9 Cal.4th 331, 354.) The rule does not apply however, to a question of law involving an unauthorized sentence. (*People v. Welch* (1993) 5 Cal.4th 228, 235.) Because the instant claim raises a question of law concerning the legality of the sentence, we shall consider defendant's claim of error.

In sentencing defendant, the court made count one the principal term, imposed the upper term of nine years, plus a consecutive term of 25 years to life for the section 12022.53,

subdivision (d) enhancement, plus a consecutive 10 year term for the section 12022.55 enhancement. Similarly, on count two, it imposed a consecutive two year, four-month term for the offense, plus a consecutive term of 25 years to life on the section 12022.53, subdivision (d) enhancement and a consecutive two-year (1/3 the mid-term) term for the section 12022.55 enhancement. The court then stayed both section 12022.55 enhancements pending finality of the sentence on the 12022.53 enhancements. The court stated that the stay is to become permanent when the sentence on the section 12022.53 enhancements becomes final.

Section 12022.55 requires imposition of an additional and consecutive prison term of five, six, or ten years where the defendant intentionally inflicts great bodily injury or death on another person other than an accomplice, as a result of discharging a firearm from a motor vehicle in the commission of a felony or attempted felony. Section 12022.53, subdivision (d) requires imposition of an additional and consecutive prison term of 25 years to life where the defendant, personally and intentionally discharges a firearm, proximately causing great bodily injury to another person other than an accomplice in the commission of a qualified felony.

However, subdivision (f)[12] of section 12022.53 limits the number of firearm enhancements that may be imposed on each count

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[12] Subdivision (f) provides: "Only one additional term of imprisonment under this section shall be imposed per person for each crime. If more than one enhancement per person is found

by restricting to one, the number of enhancements that may be imposed under section 12022.53.[13] Additionally, it restricts imposition of enhancements under other specified provisions. In this regard, it provides in pertinent part: "[a]n enhancement involving a firearm specified in Section . . . 12022.55 shall not be imposed on a person in addition to an enhancement imposed pursuant to this section."

Thus, where the jury finds true an enhancement under section 12022.53, imposition of an enhancement under section 12022.55 is prohibited by section 12022.53, subdivision (f). Section 12022.53 does not define the word "impose." However, as the court stated in *People v. Bracamonte, supra*, 106 Cal.App.4th at page 711, that word encompasses the situation where "an enhancement is imposed and then executed and imposed and then stayed. However, as a practical matter, the word 'impose' is

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true under this section, the court shall impose upon that person the enhancement that provides the longest term of imprisonment. An enhancement involving a firearm specified in Section 12021.5, 12022, 12022.3, 12022.4, 12022.5, or 12022.55 shall not be imposed on a person in addition to an enhancement imposed pursuant to this section. An enhancement for great bodily injury as defined in Section 12022.7, 12022.8, or 12022.9 shall not be imposed on a person in addition to an enhancement imposed pursuant to subdivision (d).

[13] Section 12022.53 provides three separate enhancements involving the commission of a qualified felony. Subdivision (b) applies to the personal use of a firearm, subdivision (c) applies to the personal and intentional discharge of a firearm, and subdivision (d) applies to the personal and intentional discharge of a firearm resulting in great bodily injury or death.

often employed as shorthand to refer to the first situation, while the word 'stay' often refers to the latter."

This construction is consistent with statutory authority and the applicable cases and California Rules of Court governing the imposition of enhancements. Under those authorities, the trial court must either impose an enhancement or strike the underlying finding in the interests of justice, setting forth its reasons for striking the finding. (§ 1385; *People v. Harvey* (1991) 233 Cal.App.3d 1206, 1230-1231; *People v. Eberhardt* (1986) 186 Cal.App.3d 1112, 1121.) Imposition of an enhancement may not be stayed. (*People v. Eberhardt, supra,* at pp. 1122-1123.)

In *Eberhardt*, the court cited *People v. Calhoun* (1983) 141 Cal.App.3d 117, in discussing the distinction between striking and staying an enhancement, recognizing that they "are not the same thing." Referring to *Calhoun*, the court in *Eberhardt* stated "[t]he trial court there stayed a firearm use enhancement. (§ 12022.5.) The Court of Appeal held section 1385 does not permit such a stay. (*Id.*, at pp. 124-126.) 'The difference between "striking" and "staying" is not a mere linguistic difference. As discussed above, striking the enhancements would have implied a finding that they were insupportable in the interests of justice or would have required mitigating factors. (§§ 1385, 1170.1, subd. (g).) The decision to "stay" is, on the other hand, a sentencing method; that is, a sentence may be "imposed" or "stayed."' [Citation]. [¶] The

distinction is important. When a court utilizes its power under section 1385, the reasons *must* be entered on the minutes [Citation] and must be reasons which would motivate a reasonable judge. [Citation.] In other words, there must be a record justifying the action taken." (*People v. Eberhardt, supra*, 186 Cal.App.3d at pp. 1122-1123.)

Thus, when the jury returns a true finding on an enhancement, the trial court may only strike it pursuant to section 1385, setting forth its reasons for doing so. The trial court did not do so here. Rule 4.447 sets forth the proper procedure under these circumstances by directing the trial court to impose sentence upon an enhancement and stay its execution to the extent the enhancement causes the sentence to exceed that permitted by law. It states: "No finding of an enhancement shall be stricken or dismissed because imposition of the term is either prohibited by law or exceeds limitations on the imposition of multiple enhancements. The sentencing judge shall impose sentence for the aggregate term of imprisonment computed without reference to those prohibitions and limitations, and shall thereupon stay execution of so much of the term as is prohibited or exceeds the applicable limit. The stay shall become permanent upon the defendant's service of the portion of the sentence not stayed." Thus, we conclude that under rule 4.447, the trial court properly imposed and stayed the section 12022.55 enhancements.

Contrary to respondent's assertion, *People v. Bracamonte*, *supra*, 106 Cal.App.4th 704, reached a contrary conclusion and is inapposite. There the court found multiple sentencing errors and reversed and remanded for resentencing. Defendant Medina was convicted of first-degree murder, robbery, and the special circumstance of murder during the commission of a robbery. The trial court imposed a sentence of life imprisonment without the possibility of parole (LWOP) for the murder, plus 25 years to life on the firearm discharge and use enhancement under section 12022.53, subdivision (d)), and a concurrent term of four years for the robbery, which the court stayed pursuant to section 654. The court also imposed and stayed firearm discharge and use enhancements as to both counts. In particular, it stayed as to count 1, the enhancements under sections 12022.5 and 12022.53, subdivisions (b) and (c).

On the issue of striking or staying the enhancements, the court concluded the proper resolution required the trial court to add the applicable section 12022.53 enhancements found true and then stay execution of all but the longest of those enhancements,[14] while striking the section 12022.5 use

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[14] The court reached this conclusion by looking to the language of section 12022.53, subdivision (f), which authorizes imposition of only one enhancement under section 12022.53, while subdivision (h) of that same section prohibits the court from striking "an allegation under this section or a finding bringing a person within the provisions of this section." To harmonize these two "seemingly conflicting provisions," the court concluded "that section 1202.53 operates to require the trial court to add the applicable enhancement for each firearm

enhancement. (*Bracamonte, supra,* 106 Cal.App.4th at pp. 712, 714.) In so holding, the court found that rule 4.447 did not empower the trial court generally to stay the enhancement under section 12022.5 because in its view that rule did not apply to enhancements that are attached to counts for which an indeterminate life sentence was imposed. It therefore concluded that unlike the section 12022.53 enhancement, the 12022.5 enhancement must be stricken.

We do not address the merits of the court's conclusion regarding application of rule 4.447 to indeterminate sentences, because unlike *Bracamonte*, the present case involves enhancements attached to two determinate sentences. The procedure outlined in rule 4.447 is therefore applicable. Accordingly, we find the trial court properly imposed and then stayed the section 12022.55 enhancements and reject defendant's claim of error.

VI.

Conduct Credits

Defendant contends the trial court erroneously denied him presentence conduct credits without providing him with notice and opportunity to be heard on the matter. Respondent contends this claim has no merit, arguing that defendant waived the error

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discharge and use allegation under that section found true and then to stay the execution of all such enhancements except for the one which provides the longest imprisonment term." (106 Cal.App.4th at p. 713.)

by failing to raise a timely objection[15] and that he received sufficient due process. However, in the event we reach the merits of the claim and find error, respondent asks us to amend the abstract of judgment to reflect the conduct credits rather than to remand the matter to the trial court.

We find error and shall order the abstract of judgment be amended to reflect that defendant earned an additional 292 days credit.

The court awarded defendant 584 custody credits. The abstract of judgment reflects that he was given 584 days custody credits (§ 2900.5, subd. (a)) and no conduct credits for good behavior or work. (§ 4019.) There was no discussion or presentation of evidence relating to conduct credits at the sentencing hearing. The probation report indicated defendant had numerous minor infraction reports and one notable incident during his custody on December 8, 2001, for threatening his co-defendant. It made no mention of conduct credits.

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15 As discussed *ante,* defendant may raise a claim of sentencing error for the first time on appeal where the trial court imposes an unauthorized sentence which raises a pure question of law. (*People v. Welch, supra,* 5 Cal.4th at p. 235.) The trial court has a duty to determine the total number of days to be credited towards the service of the sentence, including conduct credits earned pursuant to section 4019. (§ 2900.5, subds. (a) & (d).) The court's failure to carry out that duty renders "'its initial finding and resulting sentence a nullity.'" (*People v. Fares* (1993) 16 Cal.App.4th 954, 958.) Therefore, because the issue tendered raises a question of law going to the legality of the sentence, we shall consider the claim.

Upon conviction for a felony, section 4019 provides conduct credits for good behavior and work performed by a person confined in a county jail following arrest and prior to imposition of sentence. (§ 4019, subd. (a)(4); *People v. Heard* (1993) 18 Cal.App.4th 1025, 1027-1028.) The credits shall be awarded "unless it appears by the record that the prisoner has not satisfactorily complied with the reasonable rules and regulations established by the sheriff . . . . " (§ 4019, subd. (c).) As noted, the trial court is required to determine the total number of days of presentence custody, including conduct credits, which must be reflected in the abstract of judgment. (§ 2900.5, subds. (a) & (d); rule 4.472; *People v. Duesler* (1988) 203 Cal.App.3d 273, 276-277.)

Due process requires that, before such credits may be denied, "the defendant is entitled to prior notice and an opportunity to (1) rebut the findings of his jail violations, and (2) present any mitigating factors." (*People v. Duesler, supra*, 203 Cal.App.3d at p. 277; *In re Walrath* (1980) 106 Cal.App.3d 426, 432 [prisoner entitled to notice and hearing before conduct credits may be deducted from sentence by prison officials].) The presentence report is the appropriate vehicle for providing notice to a defendant that his conduct credits are at risk by suggesting or recommending that such action be taken. (*People v. Duesler*, *supra*, at p. 277.) A report that merely mentions that defendant had behavioral problems in jail is

insufficient to give notice that conduct credits may be denied. (*Ibid*.)

Here the probation report did not provide adequate notice to support a denial of section 4019 credits. Although the report advised of defendant's infractions and an incident involving his co-defendant, it made no mention of conduct credits, either suggesting or recommending that they be withheld. Thus, defendant had no notice he had a reason to defend on the issue of conduct credits. Moreover, the sheriff or the People have the burden of showing defendant is not entitled to conduct credits under section 4019 (*People v. Johnson* (1981) 120 Cal.App.3d 808, 815; *People v. Duesler, supra,* 203 Cal.App.3d at p. 276) and they made no such showing. Accordingly the trial court erred by failing to award conduct credits. (§ 4019, subd. (c).)

We next consider whether to remand the matter to the trial court or to make the calculation ourselves and order that the abstract of judgment be amended to reflect those credits. Respondent requests that we make the correction. We have the authority to correct an unauthorized sentence (*People v. Turner* (2002) 96 Cal.App.4th 1409, 1412-1413) and there is no factual dispute over the number of credits earned (see *People v. Fares, supra*, 16 Cal.App.3d at pp. 959-960 [remanded for recalculation of conduct credits earned where amount of credit in dispute]). Under these circumstances and in the interests of judicial economy, we shall order that the abstract be amended.

Section 4019 provides that "if all days are earned under this section, a term of six days will be deemed to have been served for every four days spent in actual custody. (§ 4019, subd. (f).) We calculate that formula by dividing the number of days of actual custody by four and multiplying that number by two without rounding up any remainder. (*People v. Culp* (2002) 100 Cal.App.4th 1278, 1283, fn. 2; *People v. Smith* (1989) 211 Cal.App.3d 523, 527 [statute precludes rounding up].) Applying that formula, defendant is entitled to receive 292 days of conduct credits.

DISPOSITION

The trial court is directed to prepare a corrected abstract of judgment reflecting receipt of 292 days of conduct credits and to forward a certified copy of the corrected abstract of judgment to the Department of Corrections. As modified, we affirm the judgment of conviction.

BLEASE, Acting P. J.

We concur:

RAYE, J.

MORRISON, J.